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NO. 1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE OSER, *Petitioner*

v.

CARL S. SMITH,
HARRIS COUNTY VOTER REGISTRAR

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 164th JUDICIAL DISTRICT

RAEBURN NORRIS
201 Scanlan Building
Houston, Texas

AL SCHULMAN
505 Scanlan Building
Houston, Texas

JAMES HIPPARD
1023 Americana Building
Houston, Texas

RONALD COHEN
505 Scanlan Building
Houston, Texas

Attorneys for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX

Table of Contents

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Pertinent Pleadings and How the Federal Questions were Raised	3
B. The Facts	4
C. Why the Case is Not Moot	8
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	14

Table of Cases

	Page
Baker v. Carr, 369 U.S. 186 (1962)	9
Bartkus v. Illinois, 359 U.S. 121, 155 (1959)	13
Hague v. C.I.O., 92 U.S. 531	10
Hague v. C.I.O., 307 U.S. 496, 519 (1939)	10
Harper v. Virgina State Board of Elections, 383 U.S. 663, 670 (1966)	9
Katz v. United States, ___U.S. ___, 88 S.Ct. 507, 511 (1967)	9
Katzenbach v. Morgan, 384 U.S. 643, 647 (1966)	10
Monroe v. Pape, 365 U.S. 167 (1961)	13
Parker v. Busby, 170 S.W. 1042 (Tex. Civ. App. 1949)	11
Reynolds v. Sims, 377 U.S. 533, 554 (1964)	9, 12, 14
Snowden v. Hughes, 321 U.S. 1, 8 (1944)	13, 14
United States v. Cruikshank, 92 U.S. 543, 552, 553 (1876)	10
Walker v. Thetford, 418 S.W.2d 276, 287, 288 (June 1967), writ ref. n.r.e.	12
Wesberry v. Sanders, 376 U.S. 1, 17 (1964)	10

MISCELLANEOUS

	Page
Edmond Cahn, The Predicament of Democratic Man, 1961, Dell Pub. Co.	14
"Education and Politics in Boomtown," Moskowitz, *Saturday Review*, Feb. 17, 1968, p. 52	8

CONSTITUTION AND STATUTES

U. S. Constitution, Fourteenth Amendment	2, 3, 9, 13
U. S. Constitution, Due Process Clause	2, 9, 11
28 U.S.C., Sec. 1257(3)	2
42 U.S.C., Sec. 1983	14
Texas Revised Civil Statutes:	
Art. 5.10a	4
Art. 5.11a	6
Art. 5.12a	6, 11
Art. 5.17	4
Art. 5.17a	2, 6

INDEX TO APPENDIX IN PETITION

Appendix A:	
Instrument Cancelling Petitioner's Voter Registration for 1967, Executed by Carl Smith, Harris County Voter Registrar, November 22, 1967	1a
Judgment of the 164th Judicial District Court, January 3, 1968	3a
Appendix B:	
U. S. Constitution, Amendment XIV	6a
Texas Revised Civil Statutes	6a
Article 5.10a	6a
Article 5.11a	7a
Article 5.12a	7a
Article 5.17	8a
Article 5.17a	9a

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 164th JUDICIAL DISTRICT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, George Oser, prays that a writ of certiorari issue to review the judgment of the District Court of Harris County, Texas, 164th Judicial District, entered January 3, 1968 (A. 3a; Tr. 8) in Case No. 750,608, styled George Oser v. Carl S. Smith, Harris County Voter Registrar, Defendant, and George Polk and Sam Lucario, Challengers, wherein the 164th Judicial District Court of Harris County affirmed by judgment (A. 3a; Tr. 8, 9)

the Order of the Harris County Voter Registrar (A. 1a; Tr. 42) cancelling the Voter Registration of petitioner, despite petitioner's claim that such judgment constitutes an unlawful deprivation of his right to vote.

OPINION BELOW

No opinion was rendered by the court. An order stating the court's Findings of Fact and Conclusions of Law was entered December 20, 1967, and is unpublished. It appears in the official transcript filed with the papers in this Petition (Tr. 60, 61).

JURISDICTION

Judgment of the 164th District Court of Harris County, Texas was entered, nunc pro tunc, on January 3, 1968 (A. 3a; Tr. 8, 9). In petitioner's action, according to Texas Revised Civil Statutes, Art. 5.17a. (A. 9a) "the decision of the district court shall be final." Because no case has interpreted the finality of the above language, petitioner, out of an abundance of caution, has perfected an appeal in this case to the Court of Civil Appeals of Texas. However, the challenger of Petitioner's registration, by judicial admission in the Court below, took the position that no further appeal could be had from the District Court's decision. (Tr. p. 50). This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

Whether the Due Process Clause, as well as the Equal Protection Clause of the Fourteenth Amendment protects the right to vote in a state election of a citizen who has all the necessary qualifications for voting save a voter-

registration certificate, where the citizen made repeated timely applications to the voter registrar but the registrar failed and refused to issue the citizen a certificate?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States. In addition, five sections of the Texas Election Code are involved. These provisions, in pertinent part, are set forth in Appendix B to the instant Petition (A. 6a).

STATEMENT OF THE CASE

A. Pertinent Pleadings And How The Federal Question Was Raised.

Petitioner, George Oser, filed an appeal in the District Court to re-establish his right to vote, after the Harris County Voter Registrar entered an order cancelling his registration. Petitioner pled that he had made repeated timely applications for registration which were ignored by the voting officials. The registration finally issued him was held to be not timely and, therefore, cancelled at a hearing of the Registrar called to consider the status of petitioner's registration. Petitioner asserted that because of the importance of the constitutionally-protected right to vote, his continued good-faith efforts to register should be deemed to be a compliance with the state registration laws (Tr. 14-17). The court holding against petitioner, petitioner gave notice in open court before final judgment that he would press the issue of denial of due process and of equal protection of the laws (Tr. 56), and he asserted that an interpretation of the Texas voter registration law

to deny petitioner's right to vote necessarily brought such voter registration law into conflict with the requirements of due process (Tr. 56). After such notice the court concluded that the statutes were applicable to the case, found that petitioner had not been issued a timely certificate, and upheld the cancellation of the certificate (Tr. 61).

B. THE FACTS

The facts, which are not in dispute, are established by admissions in the pleadings contained in the Transcript (Tr.), by uncontroverted testimony admitted in evidence by the court and contained in the Statement of Facts (S.F.) and by Exhibits (E.).

Petitioner, George Oser, is a citizen of the United States and of Harris County, Texas. On October 15, 1966, petitioner, acting through his wife as agent, as permitted by Texas law, called the Office of the Tax Assessor, Carl S. Smith, the chief voter registrar for Harris County, and requested applications for voter registration certificates for the both of them. Petitioner's wife telephoned on the assumption that having established six-month residence in the county, they would be entitled to register during the registration period that had begun October 1, ~~(S.F. 51).~~ ~~In fact~~, Articles 5.10a and 5.17, the provisions of the election code providing for the issuance of registrations and exemption from the poll tax for new residents, ~~did~~ direct that applications for registration be issued them at the time of the call ~~(A. 6a, 8a)~~. Article 5.17, providing poll tax exemptions, was applicable until its repeal, effective February 1, 1967. The overlapping statute, Article 5.10a, which had been passed effective October 1, 1966

to establish new registration procedures in light of the demise of the poll tax, also directed that petitioner be registered at the time of their call (A. 6a). Although petitioner would not have been entitled to vote at the polls until he had been a county resident for six months and a state resident for twelve, he was entitled to register to vote under either of the two pertinent registration statutes, and because he was a citizen who met every necessary qualification in the election code, the statutes charged the tax assessor's office with the duty to accept his application. Despite this, petitioner's wife was told that they could not be registered and she was told to call back in January, 1967 (S.F. 21). Petitioner's wife, as agent, called back in January, twice. In the first of those calls, petitioner's request for a registration form was denied, and petitioner was told by the deputy registrar that petitioner and his wife would have to be residents of the state for twelve months before they could register. No law, old or new, contained a requirement such as this one. Petitioner's wife called again in January to clarify her understanding and requested she be sent application forms to register. This time the deputy to whom she was referred told her that she was "wasting her time," and no forms were sent to her (S.F. 67).

In July, 1967, following the publication of sample voter registration applications in local newspapers because of "the effect of new laws," petitioners applied for voter registration certificates, armed with the knowledge that their one year of state residence had been established. This time their applications were accepted and certificates issued them (S.F. 59-61; E. 2). Petitioner's certificate recited that he had become a resident on April 15, 1966 (*before* the beginning of the previous registration period,

October 1, 1966) and that he was entitled to vote at any election after April 15, 1967 ~~(E. 2)~~.

On or about October 26, 1967, a short while after petitioner filed as a candidate for the Houston School Board, he was contacted by the tax assessor's office and told that something was amiss with his registration ~~(S.F. 22)~~. The basis for a challenge to the certificate in his possession was Article 5.11a, which set an exclusive period for registration, and Article 5.12a, which held that new residents of the state who had established their residency *after* the beginning of the previous registration period could register for that voting year after the close of the registration period, which in petitioner's case was January 31, 1967. Article 5.12a became law on June 12, 1967, less than one month before petitioner applied for and received his registration certificate. The morning after petitioner received this message, he was contacted again by the registrar's office, who told him this time that it was a mistake on their part and that petitioner's name would not be taken off the voter rolls ~~(S.F. 64)~~.

Petitioner received over 53,000 votes in the school board election held on November 18, 1967, thereby qualifying for the run-off to be held shortly thereafter. On November 22, 1967, at a hearing called by Carl S. Smith, County Tax Assessor, petitioner's registration certificate was held to be untimely issued, and his name was ordered stricken from the voter rolls ~~(A. 1a)~~. Appeal was perfected by petitioner to the 164th Judicial District Court pursuant to Article 5.17a (A. 4a, 9a).

At the trial court petitioner asserted the liberal protections in Texas law protecting the right to vote (Tr. 14-16, 43-45). He relied largely upon an Opinion of the

State Attorney General, to be accorded the highest weight in the absence of controlling case law, which held that a person who has made timely application for a voting certificate but who has failed to obtain one because of the failure of the county authorities to provide and issue one, may not be deprived of his right to vote (Tr. 21-29). Despite this the Court upheld the action of the county voter registrar and executed an order which recited: "Plaintiff did not properly register and did not diligently comply with the means available to him to register in accordance with the law prior to the 1967 election held by the School Board of the Houston Independent School District" (Tr. 33, 34). Final judgment, nunc pro tunc, was entered on the above order on January 3, 1968 (A. 3a; Tr. 8, 9).

At the trial court the chief voting registrar testified repeatedly about mistakes in his office procedures and confusion about the election laws as the reason for the refusal of any timely applications by petitioner. His office operated under the belief, even months after Article 5.17's repeal, that petitioner could register at any time up to thirty days before an election and vote after he had completed one year of residence (S.F. 42, 43). This partly explains why petitioner was not registered when he applied during the registration period. The registrar admitted confusion regarding the changes in the election laws at the time when petitioner first applied (S.F. 48). He testified that his deputies would have been violating the procedure of their own office in not referring petitioner to someone higher in authority before making a refusal (S.F. 45). Moreover, when petitioner was finally issued a certificate in July, 1967, such issuance, according to the registrar was "for lack of being up on the law" (S.F. 42). The

registrar testified that he had issued at least forty registrations in addition to petitioner's to persons in a similar situation (S.F. 37).

It was undisputed that prior to the time of petitioner's repeated applications, the state had exercised its power to make classifications and establish requirements to qualify for the franchise, that there was no issue of bona fide residence involved or determined against petitioner, that petitioner was not contained in any category of persons disqualified to vote, and that there was no administrative benefit to the state in refusing his applications. Each time petitioner applied, there remained only for the registrar to issue an application, receive and process it.

C. Why The Case Is Not Moot

Restoring petitioner's 1967 right to vote would not be an empty gesture. The outcome of an election turned on his disputed qualifications as a voter, and decision in this case would alter the merits of an election contest filed in petitioner's behalf. After petitioner forced an encumbent member of the Houston School Board into a run-off, the County Voting Registrar cancelled petitioner's registration certificate. While petitioner was appearing before the Texas Supreme Court in an attempt to establish his qualifications as a voter by extraordinary proceeding, the School Board simply removed Oser's name from the ballot and the Court informally ruled that the question was moot because the election was already in progress. Petitioner's suit now pending calls for a new election for the four-year position.[1]

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1. The events above were included in a longer report concerning the Houston School Board, "Education and Politics in Boomtown," Moskowitz, *Saturday Review*, February 17, 1968, p. 52.

REASONS FOR GRANTING THE WRIT

This Court has stated, "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims,* 377 U.S. 533, 554 (1964). Though the Court, in applying the Fourteenth Amendment to protect the franchise, has relied on "a searching re-examination of the Equal Protection Clause," *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966), since the decision in *Baker v. Carr,* 369 U.S. 186 (1962), it must inescapably follow and this case is ripe for decision that State election practices also cannot conflict with the requirements of the Due Process Clause. The traditional treatment of the franchise is similar to that of a person's general right to privacy as this Court described it: "like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States,* ____U.S.____, 88 S.Ct. 507, 511 (1967). But despite distinction between "federal rights" and "federally-protected rights" this Court has held, "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Board of Elections,* above, 383 U.S. at 665. Such continued avowals as this one by the Court compel the conclusion that a citizen may not be disenfranchised by the unlawful application of state registration laws without suffering deprivation of the fundamental fairness that our people are taught to expect automatically.

Petitioner asserts that the Due Process Clause preserves the integrity of the franchise and does so without enlarging the category of privileges and immunities of United States

citizenship that has been established previously. Having met the qualifications defined by the State, petitioner must be able to exercise his right to vote free from capricious abridgment; this is essential to "the very idea of a government, republican in form," the same way in which the Court described the right of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552, 553 (1876). Yet as to these just-mentioned freedoms of speech and of assembly, according to Mr. Justice Stone, "it has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers." *Hague v. C.I.O.*, 307 U.S. 496, 519 (1939) (plurality opinion). The Due Process Clause must protect them and the clause is to be applied "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." *Hague v. C.I.O.*, above, 92 U.S. at 531 (by Mr. Justice Stone).

This Court has begun to surround the franchise with protections afforded only the most fundamental personal rights. The issue of personal liberty involved in protecting the franchise is expressed by the Court when it says, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Therefore, the states by law or practice "have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment or any other provision of the Constitution." *Katzenbach v. Morgan*, 384 U.S. 643, 647 (1966).

Petitioner's attempts to register were thwarted, as the record shows, because of a profusion of procedural inadequacies violative of the requirements of due process. It was only natural for a citizen inquiring on three separate occasions whether he would be permitted to register to rely on the advice of the officials to whom his inquiries were directed. The Court's Findings of Fact (Tr. 61), that petitioner "did not apply for registration as a voter during [the prescribed] period," is in glaring discrepancy with the uncontradicted testimony that petitioner not only made continued attempts to register at the times when he should have been registered, but demonstrated his persistence by applying again and being issued a registration, this time, however, after the effective date of Article 5.12a, which retrospectively closed the registrar's doors to all those who had become residents before the beginning of the previous registration period, according to the interpretation placed thereon by the District Court. Moreover, the findings in the court's opinion and judgment (A. 3a; Tr. 8, 9, 61) that petitioner did not exercise reasonable diligence or take reasonable advantage of the means available to enforce his right cannot stand before the evidence that petitioner, as a qualified voter, had done all that the law required at his own hands. The statutes which established the exclusive period for registration did not anticipate a case of an election official's refusal to act.[2] It would have been unnatural for petitioner to have pursued the matter with the election officials who told him he was "wasting his time." (S.F. 67) Legal action,

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2. Under Texas law the failure of an election official to issue a registration blank though resulting from an innocent misapprehension of the legal requirements is tantamount to an outright refusal to issue the blank. *Parker v. Busby*, 170 S.W. 1042 (Tex. Civ. App. 1949).

by mandamus or other extraordinary remedy, would not only have been unnatural, but would have been to add onerous conditions not required by the election laws.

In addition, that one of petitioner's most fundamental rights was so casually abridged, because of the misapplication of the election laws on the part of the state voting officials specifically charged with administering them, deprived petitioner of "the opportunity for equal participation by all voters in the election of [state officials] that is required [by the Equal Protection Clause]." *Reynolds v. Sims,* above, 377 U.S. at 566.

The registrar corrected his mistake by cancelling the registration of this petitioner, alone among the forty-five registrations which had been similarly issued. The Court's affirmance of this action was, at the least, an unusual application of Texas law. A Court of Civil Appeals had recently concluded that the Texas case law unequivocably demanded an interpretation of registration laws and all other statutes regulating the right to vote which would avoid, within reasonable interpretation, depriving individuals of their franchises. The court found Texas within the general rule that "a vote is not rendered invalid by an irregularity in registration due to the act or default of registration officers." (Quoting American Jurisprudence) *Walker v. Thetford,* 418 S.W.2d 276, 287, 288 (June, 1967) (writ refused, no reversible error found by the State Supreme Court). The statement most directly in point, the Attorney General's Opinion (Tr. 21-29), held that the vote should not be deprived when attempts to register had foundered on the voting officials' ignorance of the laws. Such was the unequal treatment afforded petitioner.

In *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), the Court indicated a need to allege deliberate discrimination to invoke the Equal Protection Clause, where the right to hold state office and the right to vote in state elections was held not to be a privilege of a citizen of the United States, as the Constitution defines such privileges. The Court put it as follows:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, above, 321 U.S. at p. 8.

The reapportionment decisions of this Court dealt with dilutions of the state franchise by striking down unconstitutional statutes. To the extent therein that the Court held that the Equal Protection Clause assures an equal voice to all who hold the right to vote, the basis was laid for protecting the right from arbitrary abridgement in fact, without having to trace such abridgement to intentional discrimination. Regardless of the intent of the officials in refusing to register petitioner, when taking Mr. Justice Black's direction to examine the application of the laws "from the standpoint of the individual who is being prosecuted," *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (dissent), the franchise was withheld from petitioner when he was qualified to become a registered voter, and the disenfranchisement was not occasioned by his own fault or neglect. The decision in *Monroe v. Pape*, 365 U.S. 167 (1961), effectively overruled the provisions of *Snowden v. Hughes*, above, concerning the Equal Protection Clause

insofar as it was no longer necessary to allege specific intent in a Section 1983 action. Title 42 U.S.C. Sec. 1983. If the remaining language of *Snowden* would direct that the legal voter who has properly applied for registration in a state election, but who has been deprived of the right by the failure of the registrar to act can, by reason of such failure, also be deprived by the state of the Constitutionally-protected right to vote at the polls, then such language was overruled, *sub silentio*, by *Reynolds v. Sims*, above.

Due process of the laws requires not a search for the intention behind official conduct, but an analysis of its necessary consequence. A renowned observer of our democratic institutions has stated: "Due process is at once our acknowledgment of ignorance and our device to mitigate the damage that ignorance inflicts." Edmond Cahn, *The Predicament of Democratic Man*, 1961, Dell Publishing Co., N.Y., p. 149. The conduct of the registrar would raise the doctrine of *estoppel in pais* in common law. Due process requires that the doctrine be converted here into a barrier surrounding petitioner's Constitutionally-protected right, keeping it from capricious encroachment.

CONCLUSION

For the reasons assigned, petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the decision and judgment of the

164th Judicial District Court of Harris County, Texas, entered in Cause No. 750,608 on January 3, 1968.

Respectfully submitted,

RAEBURN NORRIS
201 Scanlan Building
Houston, Texas

AL SCHULMAN
505 Scanlan Building
Houston, Texas

JAMES HIPPARD
1023 Americana Building
Houston, Texas

RONALD COHEN
505 Scanlan Building
Houston, Texas

Attorneys for Petitioner

DATED: February 28, 1968